

**Before the Commission  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Various Petitions For )  
Digital Wide-Area 800 MHz )  
Trunked Specialized Mobile Radio )

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 30, 1999**

**Released: January 14, 2000**

**By the Commission:**

**I. INTRODUCTION**

1. In this Order we address multiple petitions for reconsideration<sup>1</sup> and applications for review<sup>2</sup> filed by various licensees (collectively, Petitioners) who applied for site-specific authorizations in the 800 MHz Specialized Mobile Radio (SMR) service prior to our adoption of geographic area licensing and auction rules. Between November 1993 and August 1994, the Commission received over 40,000 applications for 800 MHz channels, primarily from licensees seeking to establish wide-area SMR systems.<sup>3</sup> To expedite processing of this application backlog, in December 1994, the Land Mobile Branch, Wireless Telecommunications Bureau (Bureau), requested that applicants submit electronic versions of their application information so that the Commission could process the information through the use of software developed by a coalition of industry trade associations. On March 17, 1995, the Bureau granted several thousand applications by Public Notice based on the results of this electronic processing.<sup>4</sup> However, on April 17, 1995, these grants were made conditional after the Bureau became

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<sup>1</sup> Petitions for Further Reconsideration were filed by Industrial Communications & Electronics, Inc. (IC&E) on Oct. 9, 1996 and Oct. 23, 1996, respectively, William R. Miller (Miller) on July 17, 1996, Motorola, Inc. and Castle Tower Corp. (Castle) on Sept. 13, 1996, Palmer Communications Inc. (Palmer) on Sept. 12, 1996, Western Wireless (Western) on Oct. 23, 1996; A Petition for Partial Reconsideration was filed by Davis Electronics Company, Inc. (Davis) on Oct. 22, 1996.

<sup>2</sup> Applications for Review were filed by Advanced MobileCom of Texas, L.P. (AMI) on Oct. 17, 1996, Motorola Inc. and Nextel Communications, Inc. (Motorola) on Sept. 24, 1996, Nextel Communications, Inc. (Nextel) on August 8, 1996, Pittencierff Communications Inc. (PCI) on Sept. 13, 1996, and Speed-Net on November 26, 1996.

<sup>3</sup> Wide-area SMR systems generally operate by reusing a large number of frequencies at multiple low-powered digital base stations rather than by the use of the more traditional single transmitter site arrangements.

<sup>4</sup> "Wireless Telecommunications Bureau Processes Over 40,000 and Grants More Than 4,500 Applications for 800 SMR, Business, Industrial/Land Transportation and General Category Channels Received Between November 9, 1993 and August 10, 1994," *Public Notice*, mimeo No. 52823 (rel. March 17, 1995) (*March 17, 1995 Public Notice*).

aware of problems related to the processing software.<sup>5</sup> As a result, the Bureau worked with the industry to modify the software, after which all 40,000 applications were reprocessed. On October 31, 1995, the Land Mobile Branch issued a second Public Notice superseding the first public notice and granting over 6,000 applications.<sup>6</sup>

2. In this proceeding, Petitioners have sought reconsideration and review of the *October 31, 1995 Public Notice* because certain of their applications for wide area systems were not granted. Petitioners argue, *inter alia*, that their applications should have been granted because they were consistent with other wide-area requests previously granted by the Commission. Petitioners further contend that, had the applications been manually rather than electronically processed, the applications would have been granted.<sup>7</sup> Petitioner's prior requests for reconsideration were denied by the Land Mobile Branch<sup>8</sup> and the Licensing Division<sup>9</sup> of the Bureau.<sup>10</sup> Petitioners therefore filed the various

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<sup>5</sup> Grant of Applications for 800 MHz SMR Business, Industrial/Land Transportation and General Category Channels Received Between November 8, 1993 and August 10, 1994, *Order*, 10 FCC Rcd. 6635 (1995) (*April 17, 1995 Order*). The *April 17, 1995 Order* did not otherwise disturb the grants made in the *March 17, 1995 Public Notice*.

<sup>6</sup> "Wireless Bureau Vacates and Supersedes Grants to SMRS Announced by March 17, 1995 Public Notice," *Public Notice*, Mimeo No. 60472 (rel. Oct. 31, 1995) (*October 31, 1995 Public Notice*). Although some of the applications granted in the *March 17, 1995 Public Notice* were not granted in the *October 31, 1995 Public Notice*, most of the grants in the *March 17, 1995 Public Notice* also were contained in the *October 31, 1995 Public Notice*. In addition, the *October 31, 1995 Public Notice* contained a certain number of new grants.

<sup>7</sup> AMI Petition for Reconsideration (Nov. 29, 1995); Castle Petition for Partial Reconsideration (Nov. 29, 1995); Davis Petition For Reconsideration (Nov. 30, 1995); IC&E Petition for Partial Reconsideration (Nov. 30, 1995); Miller Petition for Partial Reconsideration (Nov. 30, 1995); Motorola Petition for Partial Reconsideration (Nov. 29, 1995); Nextel Petition for Reconsideration (Nov. 30, 1995); Palmer Petition for Partial Reconsideration (Nov. 29, 1995); PCI Petition for Reconsideration (Nov. 30, 1995); SpeedNet Request for Reconsideration (Sept. 13, 1996); Western Petition for Partial Reconsideration (Nov. 30, 1995).

<sup>8</sup> The Land Mobile Branch denied the petitions for partial reconsideration by Castle, IC&E, Miller, Palmer, Western, and the petitions for reconsideration filed by Nextel and PCI. *See* Letter from Terry L. Fishel, Chief, Land Mobile Branch, to Marilyn I. Suhecki, Esq., Pamela Gaary, Esq., Lukas, McGowan, Nace & Gutierrez (June 17, 1996); Letter from Terry L. Fishel, Chief, Land Mobile Branch, to Robert S. Foosner, Nextel Communications, Inc. (July 9, 1996); Letter from Terry L. Fishel, Chief, Land Mobile Branch to Elizabeth R. Sachs, Esq., and Marilyn I. Suhecki, Esq., Lukas, McGowan, Nace & Gutierrez (Aug. 14, 1996); Letter from Terry L. Fishel, Chief, Land Mobile Branch to Elizabeth R. Sachs, Esq. Marilyn I. Suhecki, Esq., Lukas, McGowan, Nace & Gutierrez (Aug. 14, 1996); Letter from Terry L. Fishel, Chief, Land Mobile Branch to Marilyn I. Suhecki, Esq., Ashlea Ball Ebeling, Lukas, McGowan, Nace & Gutierrez (Sept. 9, 1996); Letter from Terry L. Fishel, Chief, Land Mobile Branch, to Marilyn I. Suhecki, Esq., Pamela Gaary, Esq., Lukas McGowan, Nace & Gutierrez (Sept. 23, 1996).

<sup>9</sup> The Licensing Division denied the petitions for reconsideration filed by AMI and Davis. *See* Letter from Walter Boswell, Chief, Licensing Division, to Alan S. Tilles, Esq., Meyer, Faller, Weisman and Rosenberg (Sept. 17, 1996); Letter from Walter Boswell, Chief, Licensing Division, to Terry J. Romine, Esq., Lukas, McGowan, Nace & Gutierrez (Sept. 23, 1996).

<sup>10</sup> Under a Wireless Telecommunications Bureau reorganization, the Licensing Division was eliminated and its functions transferred to other divisions within the Bureau. The former Land Mobile Branch of the Licensing Division was incorporated into the Licensing and Technical Analysis Branch of the Commercial Wireless Division.

3. pleadings now pending before us. For the reasons discussed below, we (1) grant the above-referenced petitions for reconsideration and applications for review; and (2) reinstate and grant Petitioner's applications for the frequencies listed in Appendix A.

## II. BACKGROUND

4. Prior to 1995, the Commission authorized 800 MHz SMR licenses on a site-by-site and frequency-by-frequency basis. Operating from single transmitter base stations, licensees initially used analog technology to provide primarily dispatch radio services.<sup>11</sup> Over time, however, growing demand, limited capacity, and the development of uses for SMR spectrum other than dispatch service caused licensees to seek authorization for the use of digital technology in place of analog operations and the replacement of high-powered, single transmitter sites with multiple, low-powered base station configurations in order to increase spectrum efficiency. SMR licensees also sought to aggregate contiguous, individual market areas into single integrated wide-area networks.

5. In 1991, the Commission began authorizing these wide-area systems for 800 MHz channels.<sup>12</sup> As part of the wide-area system authorizations, the Commission granted licensees limited waivers of the Commission's construction rules due to the expense and complexity of implementing digital, multiple transmitter configurations.<sup>13</sup> In authorizing such systems, the Commission limited the scope of requested wide-area systems first to the geographic area defined by the contiguous and overlapping service areas of underlying stations that had been 1) constructed and placed in operation, and 2) currently licensed to or managed by the applicants.<sup>14</sup> Such contiguous and overlapping service areas constituted the "footprint" of a requested wide-area system.

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<sup>11</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *First Report and Order*, and *Second Further Notice of Proposed Rule Making*, 11 FCC Rcd. 1463, 1474, ¶ 4 (800 MHz SMR *First Report and Order*).

<sup>12</sup> See Request of Fleet Call, Inc., For Waiver and Other Relief To Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, *Memorandum Opinion and Order*, 6 FCC Rcd. 1533 (1991); Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to George Hertz, President, Advanced MobileComm of New England, Inc. (dated April 13, 1992). The Commission first authorized the use of wide-area systems in the 900 MHz SMR service in 1989. See Request of American Mobile Data Communications, Inc., For Waiver and Other Relief to Enable the Construction of a Nationwide Two-Way Mobile Data Communications Network, *Memorandum Opinion and Order*, 4 FCC Rcd. 3802 (1989).

<sup>13</sup> See Letter from Ralph A. Haller, Chief, Private Radio Bureau, to David E. Weisman, Meyer, Fallor Weisman and Rosenberg, 8 FCC Rcd. 143 (dated Dec. 23, 1992) (*Weisman Letter*). Conventional SMR systems were required by the Commission's rules to be constructed and operating within eight months of license grant and trunked SMR systems were subject to a twelve-month construction period. 47 C.F.R. §§ 90.631(f), 90.633(d).

<sup>14</sup> *Weisman Letter*, 8 FCC Rcd. at 143.

6. These wide-area system arrangements provided SMR operators the ability to expand the geographic scope of their services and aggregate large numbers of channels to provide service comparable to other service providers such as cellular. However, the Commission later found the site-by-site, channel-by-channel licensing scheme to be cumbersome and inefficient. As a result, in August 1994, the Commission adopted the *CMRS Third Report and Order*, concluding, *inter alia*, that the 800 MHz SMR service could compete with other commercial mobile radio services and should be licensed on a geographic area basis and subject to the competitive bidding process.<sup>15</sup> In light of the fundamental changes adopted in the *CMRS Third Report and Order* affecting the 800 MHz SMR service, the Commission suspended the acceptance of site-specific SMR applications as of August 9, 1994, pending the adoption of new licensing and service rules for the 800 MHz SMR service.<sup>16</sup>

7. Prior to the application freeze, however, the Commission had received over 40,000 wide-area applications for 800 MHz channels between November 8, 1993, and August 9, 1994, primarily from licensees seeking to establish or expand wide-area systems that remained subject to then existing 800 MHz service rules. The immense number of applications that were filed and the limited resources that the Land Mobile Branch was able to devote to processing the applications created a tremendous backlog. To help alleviate this backlog, a coalition of industry trade associations<sup>17</sup> developed a computer program to automate the processing of the applications and offered the software to the Commission for use in its application review process. The Commission accepted the Industry Coalition's offer of assistance. In December 1994, the Land Mobile Branch directed applicants for wide-area systems to submit their application data on electronic disk in a specific format. Each applicant was required to supplement its paper applications with the applicant's requested sites and frequencies, data regarding co-channel stations of other licensees, and data identifying "friendly" co-channel stations.<sup>18</sup> The electronically submitted applications were then processed using the Industry Coalition's software.

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<sup>15</sup> Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, *Third Report and Order*, 9 FCC Rcd. 7988, 8042, ¶ 94 (1994) (*CMRS Third Report and Order*).

<sup>16</sup> *Id.* at 8047-8048, ¶ 108. Service rules for the upper and lower channels of the 800 MHz SMR service were adopted in the *800 MHz SMR First Report and Order* and Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079 (1997) (*800 MHz SMR Second Report and Order*).

<sup>17</sup> The American Mobile Telecommunications Association, Inc., the Industrial Telecommunications Association, Inc., and the Personal Communications Industry Association (collectively, the Industry Coalition).

<sup>18</sup> See e.g. Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief, Office of Operations, Wireless Telecommunications Bureau, to Dana B. Fisher, Western Wireless (Dec. 28, 1994). "Friendly stations" constituted the underlying consenting stations and those stations owned and/or managed by the applicant.

8. On March 17, 1995, the Land Mobile Branch released a Public Notice granting over 4,500 of the 40,000 pending applications based on the use of the Industry Coalition's software. A programming flaw in the software, however, prevented the computer program from properly identifying friendly co-channel stations or applications and, as a result, errors occurred in the processing of the applications. On April 13, 1995, the Industry Coalition sought reconsideration of the grants made in the *March 17, 1995 Public Notice* and requested permission to make modifications to its software so that the Land Mobile Branch could reprocess the applications and issue a revised list of granted licenses.<sup>19</sup>

9. In light of the Industry Coalition's petition for reconsideration, on April 17, 1995, the Bureau modified all of the authorizations announced in the *March 17, 1995 Public Notice* to be conditional, pending the disposition of the Industry Coalition petition.<sup>20</sup> Subsequently, the Land Mobile Branch concluded that certain modifications to the software were needed.<sup>21</sup> To ensure compatibility with the Industry Coalition's modified software, the Land Mobile Branch directed wide-area applicants to review the data diskettes previously submitted to confirm that formatting requirements were complied with and asked applicants to resubmit their applications in a specific electronic format in the event that applicants deemed that resubmission of information was necessary.<sup>22</sup> The Land Mobile Branch stated that the purpose of the request for resubmitted electronic data was to replicate the previous data submitted with the applications in order to demonstrate compliance with either the Commission's consensual or technical short-spacing rules.<sup>23</sup> Following the receipt of resubmitted data, the Branch used the modified software to reprocess the 40,000 applications.

10. On October 31, 1995, the Bureau released another Public Notice that superseded the *March 17, 1995 Public Notice*, vacated the March 17 grants, and granted more than 6,300 applications for SMR service frequencies.<sup>24</sup> Because a number of applicants did not submit all the necessary data in electronic format, the modified Industry Coalition software did not recognize that certain applicants had consent to obtain frequencies that were short-spaced with co-channel licensees.<sup>25</sup> These applications were among those that were not granted. The applications that were not granted were placed on a waiting list pursuant to former rule section 90.611(d).<sup>26</sup> All applications placed on waiting lists for the 800 MHz band were

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<sup>19</sup> Industry Coalition's Petition for Reconsideration at 1.

<sup>20</sup> Grant of Applications for 800 MHz SMR Business, Industrial/Land Transportation and General Category Channels Received Between November 8, 1993 and August 10, 1994, *Order*, 10 FCC Rcd. 6635 (1995).

<sup>21</sup> See e.g. Letter from Terry L. Fishel, Chief, Land Mobile Branch, to Susan H.R. Jones, Esq. and Russell H. Fox, Esq., Gardner, Carton & Douglas, dated May 12, 1995.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *October 31, 1995 Public Notice*. Due to the discrepancies between the results of the two software processings, the Bureau granted the Industry Coalition's request to set aside the grants made in the *March 17, 1995 Public Notice*. *Id.*

<sup>25</sup> See para. 15 *infra*.

<sup>26</sup> 47 C.F.R. § 90.611(d) (1995).

subsequently dismissed by the Commission in the *800 MHz First Report and Order*<sup>27</sup> and the *800 MHz Second Report and Order*.<sup>28</sup>

11. The Petitioners in this matter sought to establish wide-area SMR systems by applying for digital facilities at multiple sites which they proposed to operate using only those frequencies assigned to underlying participating analog stations.<sup>29</sup> Because certain applications submitted by Petitioners were not granted by the *October 31, 1995 Public Notice*, Petitioners requested reconsideration by the Bureau of the October processing results.<sup>30</sup> In their respective petitions, Petitioners argued that even after the software used to process applications in March 1995 was modified, a flaw in the software continued to exist that prevented the grant of applications for some frequencies when the applications were reprocessed in October 1995. Petitioners also asserted that their wide-area requests were consistent with other wide-area requests previously granted by the Commission.<sup>31</sup> Furthermore, Petitioners stated that had the Land Mobile Branch manually processed the applications under its ordinary rules and procedures that were applicable at the time, the applications would have been granted.<sup>32</sup>

12. These petitions were denied by the Licensing Division and the Land Mobile Branch.<sup>33</sup> The Division and the Branch stated that prior to the March 1995 processing, wide-area applicants were contacted and specifically asked to provide, in a specific electronic format, a file listing all consenting stations and stations owned or managed by the applicant so that the software could identify friendly

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<sup>27</sup> In the *800 MHz First Report and Order*, the Commission dismissed all applications on the waiting list in the upper 200 channels of the 800 MHz band. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, PR Docket No. 93-144, 11 FCC Rcd. 1463, 1635 (1995) (*800 MHz First Report and Order*).

<sup>28</sup> In the *800 MHz Second Report and Order*, the Commission dismissed all applications in the lower 230 channels of the 800 MHz band. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079, 19173 (1997).

<sup>29</sup> See AMI at 1; Castle at 2-3; IC&E at 3; Miller at 2; Davis at 2; Motorola at 1-2; Nextel at 2; Palmer at 2; PCI at 2; SpeedNet at 1; Western at 2.

<sup>30</sup> See note 6.

<sup>31</sup> See e.g. Castle Petition for Partial Reconsideration at 1-2 (Nov. 29, 1995); IC&E Petition for Partial Reconsideration at 1-2 (Nov. 30, 1995); Miller Petition for Partial Reconsideration at 1-2 (Nov. 30, 1995); Palmer Petition for Partial Reconsideration at 1-2 (Nov. 29, 1995); Western Wireless Petition for Partial Reconsideration at 2-3 (Nov. 30, 1995).

<sup>32</sup> See e.g. Castle Petition for Partial Reconsideration at 3-4; IC&E Petition for Partial Reconsideration at 3-4; Miller Petition for Partial Reconsideration at 3-4; Palmer Petition for Partial Reconsideration at 3-4; Western Wireless Petition for Partial Reconsideration at 5-6.

<sup>33</sup> Certain petitions were partially granted. See e.g. Motorola at 2-3. Because not all applications that were the subject of the petitions were granted, these petitioners sought further reconsideration.

stations.<sup>34</sup> After errors were detected in the March 1995 processing results, these applicants received another opportunity to provide the necessary data prior to the October 1995 reprocessing.<sup>35</sup> The Division and Branch noted that in both instances, Petitioners failed to provide complete information in the required electronic format.<sup>36</sup>

13. In response to the decision to deny their petitions, Petitioners filed the various pleadings now pending before us. In their respective pleadings, Petitioners argue that the applications they submitted complied fully with the Commission's rules and that the failure to grant these applications was arbitrary and capricious.<sup>37</sup> They argue that we may not deny electronically processed applications that would have been granted had they been processed manually.<sup>38</sup> Petitioners also argue that there was no formal rule requiring applicants to submit application data for wide-area SMR systems in diskette or electronic format.<sup>39</sup> Accordingly, assert Petitioners, because the applications were in proper form and conformed to all rule requirements as of the date of filing, we are obligated to grant the applications in their entirety.

### III. DISCUSSION

14. By this Order, we grant the Petitioners' applications for review and petitions for reconsideration. Although Petitioners failed to provide friendly station file information in electronic format, as directed by the Land Mobile Branch and Licensing Division, we find that Petitioner's manually filed applications are complete and demonstrate compliance with our rules for short-spaced facilities. Therefore, we reinstate and grant the applications for the frequencies listed in Attachment A of this Order.<sup>40</sup>

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<sup>34</sup> See e.g. Letter from Terry Fishel, Chief, Land Mobile Branch, to Elizabeth R. Sachs, Esq., Marilyn I. Suchecki, Esq., Lukas, McGowan, Nace & Gutierrez (Aug. 14, 1996); Letter from Walter Boswell, Chief, Licensing Division, to Terry J. Romine, Lukas, McGowan, Nace & Gutierrez (Sept. 23, 1996).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See e.g. Castle at 8; Nextel at 2; PCI at 5-6; Western at 8.

<sup>38</sup> See e.g. Miller at 7-8; Motorola at 4; Nextel at 2-3; PCI at 5; Speed-Net at 5.

<sup>39</sup> AMI at 4; PCI at 5 (citing Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 94-131, 10 FCC Rcd. 9589 (1995)).

<sup>40</sup> In the period since these petitions were filed, the Commission conducted an auction of the upper 200 channels of the 800 MHz SMR band from October 28, 1997, to December 8, 1997, in which 523 licenses in 175 Economic Areas were awarded. Further, a number of 800 MHz SMR operators have transferred or assigned their interests to other entities, often to the holder of a geographic area licensee. See e.g. In re Applications of Nextel Communication, Inc. - For Transfer of Control of OneComm Corporation, *Order*, 10 FCC Rcd. 3361 (Wir. Tel. Bur. 1995); In re Applications of Motorola, Inc. - For Consent to Assign 800 MHz Licenses to Nextel Communications, Inc., *Order*, 10 FCC Rcd. 7783 (Wir. Tel. Bur. 1995); In re Applications of Dial Page, Inc. - For Consent to Transfer of Control of Dial Call, Inc. SMR and Business Radio Licenses to Nextel Communications, Inc., *Order*, DA 95-2379 (Wir. Tel. Bur. 1995); In re Applications of Pittencrieff Communications, Inc., Transferor, and Nextel (continued....)

15. SMR systems are generally given interference protection based on a fixed mileage separation from co-channel operations.<sup>41</sup> The typical separation between site-based, co-channel systems is 113 km/70 miles.<sup>42</sup> In certain situations, however, it is technically possible and mutually desirable for co-channel SMR systems to locate their systems closer together than the requisite separation distance. The Commission permits such "short-spacing" without a waiver if: (1) the licensee obtains consent from all affected co-channel licensees within the applicable area;<sup>43</sup> or (2) the licensee makes a technical showing that it will not interfere with co-channel licensees.<sup>44</sup>

16. Petitioners maintain that even as modified after the March 1995 processing run, the Industry Coalition software did not recognize that certain frequencies the applicants sought on a short-spaced basis were grantable because the proposed short-spacing was exclusively with other stations in the applicant's (Continued from previous page) \_\_\_\_\_  
Communications, Inc., Transferee - For Consent to Transfer Control of Pittencrieff Communications, Inc. and its Subsidiaries, *Order*, 13 FCC Rcd 8935 (Wir. Tel. Bur. 1997).

Because these events had some bearing on the pending petitions, the Bureau issued letters requesting clarification from Petitioners as to whether the grant of an EA license or subsequent transactions rendered any of the petitions moot and directed Petitioners to withdraw any petitions that were no longer viable. *See e.g.* Letter from Stephen L. Markendorff, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, to Elizabeth R. Sachs, Esq., and Marilyn Suchecki Mense, Esq., Lukas, Nace & Gutierrez, CWD 98-94 (Aug. 13, 1998). Attachment A reflects the applications and frequencies which Petitioners have identified as remaining ripe for our resolution. *See e.g.* Letter from Elizabeth R. Sachs, Esq., Marilyn S. Mense, Esq., Lukas, Nace, Gutierrez & Sachs, to Stephen L. Markendorff, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 28, 1998); Letter from Robert H. McNamara, Director, Regulatory Technology & Compliance, Nextel Communications, Inc. to Stephen L. Markendorff, Deputy Division Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 10, 1998).

<sup>41</sup> 47 C.F.R. § 90.621(b).

<sup>42</sup> *Id.* This mileage separation was derived from the Commission's finding that two co-channel, site-based SMR systems will generally operate effectively if the 30 dBu interference contour of one station does not overlap the 40 dBu service contour of another station. *See* Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees, *Report and Order*, PR Docket No. 90-34, 6 FCC Rcd. 4929 (1991) (*SMR Short-Spacing Report and Order*); Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees, *Corrected Memorandum Opinion and Order*, PR Docket No. 90-34, 7 FCC Rcd. 6069 (1992). This 40/30 dBμ contour standard is met if the two site-based co-channel facilities are separated by at least 113 km (70 miles). On certain mountain peaks in California and Washington, the separation between co-channel stations is 169 km (105 miles). 47 C.F.R. §§ 90.621(b)(1), 90.621(b)(3).

<sup>43</sup> 47 C.F.R. § 90.621(b)(5); *see SMR Short-Spacing Report and Order*, 6 FCC Rcd. at 4930, ¶ 9.

<sup>44</sup> 47 C.F.R. § 90.621(b)(4); *see SMR Short-Spacing Report and Order*, 6 FCC Rcd. at 4931, ¶ 15. For this latter case, we devised a table which reflected the permissible proximity between co-channel licensees whose systems are separated by less than 113 km (70 miles). Systems in compliance with the terms of the table are permitted to short-space on a non-waiver basis down to a minimum separation distance of 88 km (55 miles). 47 C.F.R. § 90.621(b)(4); *see SMR Short-Spacing Report and Order*, 6 FCC Rcd. at 4931, ¶ 15.

own wide area. They also argue that the software did not recognize instances where short-spaced applications were grantable because the short-spacing had been consented to by adjacent licensees.<sup>45</sup> Finally, Petitioners state that the software failed to grant certain applications that were permissible under the Commission's short-spacing rules because they included engineering showings demonstrating that no interference would be caused to adjacent stations.<sup>46</sup>

17. After review of petitioners' manually filed application, we find that petitioners have demonstrated that each of the applications at issue complied with either the Commission's consensual short-spacing rules, the technical short-spacing rules, or in many instances complied with both. In particular, eight of the petitioners submitted co-channel exhibits demonstrating that the proposed stations complied with the Commission's short-spacing separation table.<sup>47</sup> Further, nine of the petitioners provided confirmation that they (1) owned the co-channel licensees; (2) managed the co-channel licensees; or (3) obtained consent from the co-channel licensee to the operation of facilities co-channelled with their constructed and operational systems involving less than the usually required 70-mile separation distance.<sup>48</sup>

18. Given the fact that Petitioners have demonstrated that their applications were grantable under the Commission's short-spacing rules, we do not believe denial is warranted solely on the basis that Petitioners did not provide information in electronic format. While the record indicates that Petitioners' failure to provide this information as directed by the Bureau staff contributed to the applications not being recognized as grantable by the processing software, the Commission did have on hand all necessary information (albeit not solely in electronic form) justifying the grant of these applications. The primary rationales for dismissing the subject applications, then, were to ensure that the Bureau's efforts to expeditiously process the SMR application backlog worked, and that any *ad hoc* exceptions to this process would not undermine the principal means used in this process -- *i.e.*, the electronic filing procedure. Because an enormous number of applications were processed within a relatively short period of time, we conclude that, on the whole, the process worked quite well. Moreover, under the specific circumstances of this proceeding -- where all the information necessary for decision on the subject applications had been filed in accordance with the rules (which did not require electronic filing), where the electronic filing procedure employed was new and had presented various problems, and where the number of applicants requesting review based on non-electronically filed application material was small in comparison to the backlog -- we do not agree that the review of the manually filed applications submitted by Petitioners will undermine this procedure or similar ones that might follow. Accordingly, we conclude that the Bureau's decision to dismiss Petitioners' applications, while not altogether unreasonable, should be reversed. We are therefore ordering that these applications be granted.

19. Moreover, we conclude that grant of these applications will not prejudice other 800 MHz licensees. First, because we have imposed a freeze since August 9, 1994 on new site-based applications,

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<sup>45</sup> See *e.g.*, Western at 5; Davis at 4; Pittencrief at 3-4; IC&E at 5-6.

<sup>46</sup> See *e.g.*, Western at 5; Davis at 4-5; Pittencrief at 4; IC&E at 6.

<sup>47</sup> Castle at 3; Davis at 3; IC&E at 4; Miller at 3; Palmer at 5.

<sup>48</sup> Castle November 12, 1993 Request for Rule Waiver, Exh. 4; IC&E May 20, 1994 Request for Rule Waiver; Davis October 22, 1996 Petition for Partial Reconsideration, Supplement to Exh. A; Western December 6, 1993 Request for Rule Waiver, Exh. 4.

and the Industry Coalition software was used to process all SMR applications that were pending prior to the freeze, there are no subsequent site-based license grants that would be affected by grant of Petitioners' applications. Second, grant of Petitioners' applications does not reduce the geographic spectrum available to Economic Area (EA) licensees. Petitioners' applications were limited to requests for digital facilities which proposed the reuse of only those frequencies assigned to underlying participating analog systems.<sup>49</sup> Because these applications merely fill in digital sites within footprints already established by authorizations previously granted to Petitioners, they will enable Petitioners to add sites and frequencies only on spectrum that is already entitled to protection from interference by EA licensees.<sup>50</sup> Accordingly, we reinstate and grant Petitioners' applications listed in Appendix A.

20. Having granted Petitioners applications, we must also determine the construction requirements applicable to the licenses we are granting by this Order. To the extent this Order grants licenses to wide-area licensees who are within the extended construction periods of their wide-area systems, they may construct facilities in accordance with that deadline,<sup>51</sup> or may construct each site within one year of the effective date of this Order, whichever is later. Licenses granted by this Order to licensees whose extended construction periods have expired must construct each site no later than one year from the date of this Order. In those instances where a licensee finds that it cannot reasonably comply with these construction requirements, we will entertain requests for extensions of time, provided that the licensee explains fully why a waiver of our rules is warranted.

21. Finally, in a related matter, we find that a portion of Motorola's application, File Number 642816, was inadvertently approved as being properly short-spaced. On August 26, 1996, in partially granting Motorola's Petition for Partial Reconsideration, the Land Mobile Branch granted frequencies 861-865.0125 as part of Motorola's enhanced SMR system.<sup>52</sup> Hawaiian Wireless, Inc. (Hawaiian Wireless) filed a petition for reconsideration because it is the licensee of station WPDH511, which is co-

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<sup>49</sup> AMI at 1; Castle at 2; Davis at 2-3; IC&E at 2-4; Miller at 2; Motorola at 1-2; Nextel at 4-5; Palmer 2-3; PCI at 2; Western at 2-3.

<sup>50</sup> See e.g. Castle Request for Rule Waiver, Exh. 4; Davis Petition for Partial Reconsideration, Supplement to Exh. A; IC&E Request for Rule Waiver; Miller Petition for Partial Reconsideration, Exh. 1(a); Palmer Petition for Partial Reconsideration, Exh. 1(a); Western Request for Rule Waiver, Exh. 4. See also Motorola at 6; Nextel at 4; PCI Petition for Reconsideration at 4.

<sup>51</sup> On April 15, 1999, in response to a remand from the D.C. Circuit in *Fresno Mobile Radio, Inc., et al. v. Federal Communications Commission*, 165 F.3d 965 (D.C.Cir. Feb. 5, 1999), we tolled the construction periods of incumbent wide-area 800 MHz SMR licensees whose construction periods were still in effect, including certain Petitioners. "Wireless Telecommunications Bureau Temporarily Suspends Construction Timetable for Wide Area 800 MHz SMR Licensees Due to Court Remand," *Public Notice*, 14 FCC Rcd 6348 (1999). In a remand order in the *Fresno* proceeding, adopted on December 17, 1999, we determined that these wide area licensees should have the option of applying the construction and coverage requirements applicable to SMR licensees who obtained geographic EA licenses by auction. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Memorandum Opinion and Order, FCC 99-399 at para. 12 (rel. Dec. 23, 1999). To the extent that Petitioners choose to exercise this option, they may incorporate the license grants authorized by this order into their showing of compliance with the EA construction and coverage requirements.

<sup>52</sup> Letter from Terry L. Fishel, Chief, Land Mobile Branch to Elizabeth R. Sachs, Esq., Marilyn I. Suchecki, Esq., Lukas, McGowan, Nace & Gutierrez (Aug. 26, 1996).

channeled with Motorola's facilities with respect to those frequencies.<sup>53</sup> Hawaiian Wireless is not a participant in Motorola's wide-area system, and did not give its consent to Motorola to obtain its channels at less than the normally prescribed mileage separation.<sup>54</sup> Further, Nextel, Motorola's successor in interest, concedes that these frequencies should not have been part of Motorola's wide-area application.<sup>55</sup> Accordingly, Hawaiian Wireless' Petition for Reconsideration is granted and the grant of the frequencies 861-865.0125 in Motorola's application, File Number 642816, is hereby set aside and vacated.

#### IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 309 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration, filed by Davis Electronics Company, Inc., the Petitions for Further Reconsideration, filed by Industrial Communications & Electronics, Inc., Palmer Communications Inc., Western Wireless, Motorola Inc. and Castle Tower Corp., and William R. Miller are hereby GRANTED.

23. Accordingly, IT IS FURTHER ORDERED that, pursuant to sections 4(i), 309 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Applications for Review filed by Motorola, Inc. and Nextel Communications, Inc., Advanced MobileCom of Texas, L.P., Nextel Communications, Inc., Pittencrieff Communications Inc., and Speed-Net are hereby GRANTED.

24. IT IS FURTHER ORDERED that pursuant to sections 4(i), 309 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and sections 1.106 and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115. Petitioners' applications for frequencies within the 800 MHz SMR service that are listed in Attachment A ARE REINSTATED and GRANTED.

25. IT IS FURTHER ORDERED that Hawaiian Wireless Inc.'s Petition for Reconsideration IS GRANTED, and that the portion of the Land Mobile Branch's Order granting frequencies 861-865.0125 as part of Motorola, Inc.'s enhanced SMR system application, File Number 642816, IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>53</sup> Hawaiian Wireless Petition for Reconsideration at 1.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> Motorola at 3 n.6.